BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY ROBERT JACOBS Claimant VS. **BUILDERS STEEL COMPANY** Respondent AND **BUILDERS ASSOC. SELF INSURERS FUND OF KANSAS** Insurance Carrier	)	Docket No. 1,030,036

ORDER

Respondent and its insurance carrier (respondent) requested review of the October 10, 2006, preliminary hearing Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

This is a claim for a June 7, 2006, back injury. The Administrative Law Judge (ALJ) ordered a neutral physician to be appointed to report on claimant's condition and give his opinion as to the contribution of claimant's recent work injuries to his condition. The ALJ also ordered respondent to pay temporary total disability benefits to claimant commencing September 12, 2006.

Respondent argues that the ALJ exceeded his jurisdiction by ordering temporary total disability benefits when also ordering an independent medical examination to report on the contribution that the claimant's preexisting condition had on the June 7, 2006, injury. Respondent argues that the only evidence on causation was that claimant's medical condition and need for additional medical intervention was not as a result of the alleged work incident on June 7, 2006. Respondent also claims that it was surprised at the preliminary hearing by testimony of the claimant concerning a preexisting work injury in August 2005. Respondent claimed it had no opportunity to prepare a defense for an alleged work injury in August 2005 and that respondent was prejudiced when the ALJ allowed evidence into the record concerning the 2005 injury.

Claimant argues that his current need for medical treatment and temporary total disability benefits is due to his injury in June 2006, which he claims caused a significant change in his pain level and ability to work. Claimant also contends that since he has been taken off work by a physician, he is entitled to temporary total disability benefits and the fact that the ALJ ordered an independent medical examination rather than medical treatment does not change the fact that he is entitled to those benefits. Claimant requests that the Preliminary Decision of the ALJ be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as an ironworker by respondent. He testified that in August 2005, he injured his low back while lifting at work. He said he told his boss about his injury and that John Anderson, the general foreman, also knew about it. However, claimant said respondent stresses no-time-loss accidents, and so claimant continued to work.

Claimant sought treatment of his low back from his primary care physician, Dr. Philip Stevens. Dr. Stevens referred him to Dr. William Bailey, who saw him on November 8, 2005. Claimant told Dr. Bailey he had developed radicular symptoms in his right hip and buttock around the first of October 2005. He also complained of low back pain in the past. Dr. Bailey sent him for an MRI, which was performed on that same day. The MRI revealed that claimant had a large posterior disc bulge at L4-5 resulting in mild spinal stenosis and potential for impingement of the L5 nerve root. The MRI also showed claimant had moderate degenerative disc disease with prominent posterior endplate disc osteophyte at L5-S1 with secondary bilateral neural foraminal stenosis. Dr. Bailey diagnosed claimant with a herniated lumbar disc and recommended a lumbar epidural steroid block, which was performed on November 16, 2005. Claimant also testified that he received a steroid shot from another doctor sometime after the injection.

Claimant said he had been told that in order to receive workers compensation benefits, he needed to have filed a written claim within ten days after the accident. And since he had not filed a written claim for his August 2005 injury, he turned the expenses of his medical treatment in to his personal health insurance.

Claimant said that after the August 2005 injury, he continued to work but his back felt like it had pressure on it. However, he said he was able to work and only missed work when he visited the doctor and a few days after he had the epidural injection. Claimant continued to work until June 2006, including two overtime jobs and one that involved him traveling to Council Bluffs, Iowa. He said he had pain on occasion but worked through it.

On June 7, 2006, claimant was lifting some angle iron to a coworker when he experienced a sharp pain in the right side of his lower back. The angle iron weighed about 85 to 90 pounds, and claimant was required to lift it over his head. He stayed home the next day because his back hurt. He testified that he was contacted the day after his injury and told he was being laid off. He then told respondent that he had been injured the day before and that was why he had not gone to work.

Respondent paid claimant temporary total disability benefits and sent him to their company physician, Dr. Michael Geist, on June 12, 2006. Claimant told Dr. Geist that he had some "back strains and pains in the past, but . . . nothing significant."[1] Dr. Geist diagnosed him with low back strain and prescribed Aleve, Norflex and Lortab. Dr. Geist said claimant could return to light duty work, if it was available. When claimant saw Dr. Geist again a week later, on June 19, 2006, he was still complaining of low back pain. X-rays taken that day showed some degenerative changes. Dr. Geist recommended physical therapy, continued the pain medication, ordered an MRI done, and restricted claimant from working.

The MRI was performed on June 28, 2006. The results of the MRI revealed:

> MR imaging of the lumbar spine is essentially unchanged in comparison to 11-8-05 study. There remains relatively large posterior disc protrusion at L4-5 resulting in mild to moderate canal stenosis and narrowing of bilateral lateral recesses. There is potential for impingement of the L5 nerve roots at the lateral recesses bilaterally.[2]

Upon receipt of the results of the MRI, Dr. Geist obtained and reviewed the records of Dr. Bailey. When Dr. Geist next saw claimant on June 29, 2006, he discussed with claimant his past low back complaints. He opined that claimant's current complaints were a preexisting issue and were not related to his work activity in June 2006. He recommended that claimant see a neurosurgeon and pursue other treatment options. Dr. Geist told claimant to remain off work and continue with physical therapy. Upon receiving this report, respondent suspended payment of temporary total disability benefits.

Claimant then continued his medical treatment under his private health insurance. He went to see Dr. Frank Holladay, a neurosurgeon, on August 7, 2006. Dr. Holladay recommended ultramicroscopic surgery at L4-5 and L5-S1. The surgery was performed on September 12, 2006, about three weeks before the preliminary hearing. Dr. Holladay took claimant off work on August 7, 2006, pending surgery and for four weeks after the surgery.

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[1] P.H. Trans., Cl. Ex. 4 at 5.

[2] *Id.*, Cl. Ex. 4 at 13.

Claimant said that he worked at full capacity after the August 2005 injury, putting in 1,539 hours. He did not have the same kind of pain then that he had after the June 2006 injury. He also testified that he could not work after the June 2006 injury because of his pain. He said his tool belt alone weighed 60 pounds and that he could not travel long distances because even the 14-mile trip to Lawrence to see the doctor was painful. He said he still has pain even after the September 2006 surgery.

Respondent argues that it was not prepared to defend claimant's claim of injury of August 2005 and that evidence of that injury was prejudicial. In support of this contention, respondent points out the ALJ's comments at the preliminary hearing wherein the ALJ stated:

> You know, making all these little side deals and everything like that in the midst of something like this puts a bunch of doctors in a very bad position, puts the claimant in a very bad position, puts the insurance companies in a very bad position just trying to duck out of a workers' compensation claim. And if that's the way you people want to do business, fine, I can handle it, but getting all these doctors involved in this thing the way you have is unforgivable as far as I can see. I'll take it under advisement and I may very well refer it for investigation by the Fraud and Abuse section, because we've got to stop this business. Somebody reports an injury see that they get the workers' compensation people that know they're working for workers' compensation instead of ducking out of all these other things. This guy's obviously reported an injury the very first time it happened and everything that's been done since that has been apparently done to try to throw all this expense on to his private health insurance.[3]

Respondent also asserts that the only medical evidence in the record dealing with causation is Dr. Geist's report of June 29, 2006, which relates claimant's current condition with a preexisting injury. Neither Dr. Bailey nor Dr. Holladay addressed the issue of causation. Respondent argues that the ALJ had no jurisdiction to order payment of temporary total disability benefits and at the same time order claimant to be seen by an independent medical examiner to issue an opinion concerning causation. Claimant, however, contends that the ALJ did not indicate that claimant did not suffer an injury and the order suggests that the question is whether further treatment is related to the June 2006 injury.

Respondent also complains that claimant went ahead with the surgery performed by Dr. Holladay on September 12, 2006. Respondent asserts that the preliminary hearing in this matter was originally scheduled for August 31, 2006. At that time, an agreement between counsel was made whereby the preliminary hearing would be cancelled to allow the parties an opportunity to acquire records from claimant's previous injury. As part of that agreement, respondent agreed to pay claimant temporary total disability benefits for a

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[3] *Id.* at 44-45.

period of three weeks. Nevertheless, claimant contends that he was in extreme pain and had medical insurance that would cover the procedure immediately, so he proceeded with the surgery.

The Board is without jurisdiction to review the ALJ's appointment of a neutral physician to perform an independent medical examination and "report on claimant's condition and his opinion as to the contribution of his recent work injuries to it."[4] That is an interlocutory order that is within the ALJ's jurisdiction to decide.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[5] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[6]

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue of whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[7]

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings unless respondent is alleging one of the jurisdictional issues contained in K.S.A. 44-534a. In this regard, respondent is alleging the jurisdictional issue that claimant did not suffer personal injury by accident on June 7, 2006, and that his current injury is due to a preexisting condition.

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[4] ALJ Preliminary Decision (Oct. 10, 2006) at 2.

[5] K.S.A. 2005 Supp. 44-551.

[6] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[7] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Respondent also alleges unfair surprise at the October 5, 2006, preliminary hearing. However, claimant's Application for Hearing filed on July 20, 2006, alleged that his accident on June 7, 2006, caused an aggravation of a preexisting condition. That application alleged: "Back injury/aggravation w/ radiating symptoms."[8] Claimant also reported preexisting back problems to the physicians, including Dr. Geist, the authorized treating physician selected by respondent. The report from the June 28, 2006, MRI ordered by Dr. Geist refers to an earlier MRI performed on November 8, 2005. Obviously, it is not the fact that claimant had a preexisting back condition that came as a surprise to respondent, it is the nature and extent of that condition.

> This case involves an allegation of back injury alleged to have occurred on June 7, 2006. On that date it is undisputed the employee reported back injury and he was referred to authorized medical care with Dr. Geist. Through that course of care and evaluation it was discovered that the claimant was dishonest with Dr. Geist about his prior back problems and diagnosis a year before the accident of a large herniated disc at L4-5. The employee told Dr. Geist that he had only suffered "minor back strains" in the past. Dr. Geist ordered an MRI and surprising to Dr. Geist, the report from the radiologist made comparison to an MRI that had been performed on November 8, 2005. It was then learned that just seven month[s] prior the employee had been diagnosed with a large herniated disc compressing on the nerve root. The records revealed that the employee had suffered from much more than his reported minor strains he told Dr. Geist about.[9]

Respondent also argues that the claimant's testimony at the October 6, 2006, preliminary hearing was respondent's "first notice at all that the employee was claiming he suffered a herniated disc while working in August of 2005."[10] To clarify, claimant is only seeking workers compensation benefits for an alleged June 7, 2006, accident and injury. There is no claim for compensation for the alleged August 2005 accidental injury in this docketed claim. The Board finds respondent was not unfairly surprised. Any prejudice respondent may have suffered was as much the result of respondent's lack of diligence in investigating the preexisting condition as it was claimant's lack of candor. Furthermore, respondent argues the preliminary order for benefits was premature, but respondent did not object to the preliminary hearing or to any of claimant's testimony or exhibits, nor did respondent ask the ALJ to leave the record open for it to present additional evidence. The Board finds no denial of due process and no denial of respondent's right to present evidence by the ALJ. Accordingly, the only jurisdictional issue that respondent has raised for the Board's review is whether claimant suffered an accident and injury on June 7, 2006, and if so, whether claimant's current inability to work is due to that June 7, 2006, injury.

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[8] Form K.-WC E-1 filed July 20, 2006.

[9] Appellant's Brief filed Nov. 6, 2006, at 2.

[10] *Id*. at 3.

Kansas has long recognized the natural and probable consequence rule. The Supreme Court in *Nance*[11] stated:

> When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

However, where the injury is aggravated by an independent cause, such as a new industrial accident, the condition is no longer a direct and natural result of the prior accident. The Supreme Court in *Nance* also said:

> In *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 262, 505 P.2d 697 (1973), we noted that while the natural and probable consequences rule would not apply to a situation where the increased disability results from a new and separate accidental injury, "[t]he rule in *Jackson*[12] would apply to situation where a claimant's disability gradually increased from a primary accidental injury."[13]

Claimant was able to continue working his regular job after his August 2005 injury, but after his June 7, 2006, injury he was not. The ALJ apparently found claimant's testimony credible in this regard. And claimant's testimony in this regard is supported by the medical evidence. Claimant was issued work restrictions after the June 7, 2006, injury but none before that. Based upon the record compiled to date, claimant has proven that his June 7, 2006, accident aggravated his preexisting back condition and accelerated his need for the surgery.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[15]

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal of Administrative Law Judge Robert H. Foerschler's Preliminary Decision dated

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[11] *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 4, 952 P.2d 411 (1997).

[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[13] *Nance*, 263 Kan. at 549.

[14] K.S.A. 44-534a.

[15] K.S.A. 44-555c(k).

October 10, 2006, is dismissed as to the appointment of an independent medical examiner but affirmed as to the preliminary determination that this claim is compensable and, as such, the preliminary award of temporary total disability compensation is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

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BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant
C. Anderson Russell, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge